

May 15, 2013

Ben Williams  
8254 Bramhall Way  
Fair Oaks, California 95628

Re: Your Request for Advice  
**Our File No. A-13-047**

Dear Mr. Williams:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A) and (c)(4)(A).) In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Finally, our response only addresses the provisions of the Act. We do not provide advice on other areas of law, such as Public Contracts Code Section 10411, which may affect the post governmental employment activities about which you have inquired.

### QUESTION

1. Are you specifically precluded from bidding on the Active Directory Restructuring (“ADR”) project if, as a retired annuitant, you prepared the Feasibility Study Report (“FSR”) and Budget Change Proposal (“BCP”) for authorization of this project?
2. More generally, do the revolving door provisions preclude you from bidding on other general project management contracts for Department of State Hospitals (“DSH”)?

### CONCLUSION

1. Yes, because you drafted the FSR and BCP, you participated in the implementation of the ADR contract. Therefore, under the permanent ban, you are prohibited from bidding on the project in the award stage as it is considered part of the same implementation proceeding.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. As discussed below, you are prohibited from bidding on general project management contracts for DSH if either the one-year ban or permanent ban applies. If you need assistance in determining whether the one-year ban or permanent ban may apply to any particular contract, you should seek additional advice.

### **FACTS**

You are a retired state employee who has been working as a contract project manager for most of the past 6 years. About a year ago, you accepted a Retired Annuitant position with the DSH. In this capacity, you managed several projects for DSH. You state that you had neither procurement nor decision-making authority beyond normal project management issues, but you were designated in the department's conflict of interest code. You left DSH employment after exhausting the number of hours you were allowed to work as a Retired Annuitant. At the time you left, all the projects you had managed had either concluded or were in the final stage of completion. One of your assignments at DSH was to prepare the FSR and BCP for authorization and funding of the ADR project. The work you did in preparing the reports was under the direction of management.

You recently learned that DSH plans to issue Requests for Offers (open competitive bid) for contract project managers for a variety of upcoming projects, including the ADR project. You and your wife are the sole owners of Capitol Project Services Inc., a California S-Corporation. You have California Multiple Award Schedules and Master Services Agreement contracts under Capitol Project Services Inc., and have bid on State of California projects in the past. To date, you have only bid your own services and have never bid a subcontractor or included a subcontractor in a bid. If you did so, you would nevertheless remain the manager for the project being bid. You are now interested in bidding on further management contracts and want to know if your past work at DSH will trigger the revolving door regulations.

### **ANALYSIS**

Under the Act, public officials who left state service are subject to two types of post-governmental employment provisions, colloquially known as the "revolving door" prohibitions. The first is the "permanent ban" provision, which prohibits a former state employee from "switching sides" and participating, for compensation, in any specific proceeding involving the state of California if the proceeding is one in which the former state employee participated while employed by the state (See Sections 87401-87402, Regulation 18741.1). The second is the "one-year ban" provision, which prohibits certain state employees from communicating, for compensation, with their former agency for the purpose of influencing certain administrative or legislative action. (See Section 87406, Regulation 18746.1.)

## **Permanent Ban**

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication -- or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication -- made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official.

“‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).)

An official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee’s former agency are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

## **The ADR Project**

You state that you prepared the FSR and BCP for authorization and funding of the ADR project. Your analysis and conclusions in the FSR and BCP influenced the ADR contract. Therefore, in your position at DSH you participated in the ADR project contract implementation process. It is this contract you would now like to bid on. Implementation and awarding of a

contract are considered parts of the same proceeding; you are, therefore, permanently banned from bidding on this project as long as the FSR and BCP you prepared is the basis for the ADR project contract. (See *Millman* Advice Letter No. I-09-080 and *Stocking* Advice Letter No. A-13-035.)

### Other General Project Management Contracts

Other than the ADR project, you have not specifically identified other contracts you may have been involved in while employed by DSH. Generally, the permanent ban does not apply unless you previously participated in the proceeding as state employee. If you need assistance in determining whether you previously participated in any particular contract, you should seek additional advice describing the contract and your involvement with the contract as a former state employee.

### **One-Year Ban**

The “one-year ban” prohibits a former state employee from acting as agent of attorney for or otherwise represents any person, for compensation, by making any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions<sup>2</sup> or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who held a position that is designated or should be designated in the agency’s conflict-of-interest code. (Section 87406(d) (1); Regulation 18746.1(a) (2).)<sup>3</sup> The ban applies for twelve months from the date the employee permanently leaves state office or employment. For purposes of the one-year ban, the date on which an official permanently leaves office or employment is the date on which the official is no longer authorized to perform the duties of that office or employment and stops performing those duties. A person shall not be deemed to have left office permanently because

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<sup>2</sup> For purposes of Section 87406, the Act defines “administrative action” and “legislative action” as the following:

“‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding . . .” (Section 82002(a).)

“‘Legislative action’ means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. ‘Legislative action’ also means the action of the Governor in approving or vetoing any bill.” (Section 82037.)

<sup>3</sup> A governmental employee should be designated in his or her agency’s conflict-of-interest code if the employee makes or participates in making governmental decisions that have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

he or she is on a leave of absence or serves as an intermittent employee. However, a person shall be deemed to have left office permanently if the person has left his or her office and merely receives compensation for accrued leave credits. (Regulation 18746.4(b).)

Under Regulation 18702.4(b)(1), an appearance or communication made by a public official solely to represent his or her personal interests as defined in Regulation 18702.4, subdivision (b)(1) is not prohibited or limited by Section 87406(d)(1) or Regulation 18746.1. Pursuant to Regulation 18702.4(b)(1) a public official is solely representing his or her own interest when he or she “appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests.” Under Regulation 18702.4(b)(1)(B), a wholly owned business is considered a personal interest.

#### The ADR Project

Because you are prohibited from bidding on the ADR Project under the permanent ban, it is unnecessary to consider the application of the one-year ban to your participation in the bidding for the project.

#### Other General Project Management Contracts

As noted above, bidding on contracts other than the ADR project is prohibited under the permanent ban if you previously participated in the proceeding as a state employee. Assuming that the permanent ban does not apply, the one-year ban may apply to the extent that you are representing any interest other than your personal interest in Capitol Project Services Inc. Generally, the one-year ban would not preclude you from bidding on a project on behalf of Capital Project Services Inc. However, we caution that you may not bid on a project if you or Capital Project Services Inc. has been compensated by any other party to assist the party with the bid. If you need additional assistance determining whether the one-year ban applies to any particular contract, you should seek further advice describing the contract.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Keisha O. White  
Legal Intern, Legal Division

KOW:jgl